No. 2774

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LANCASHIRE SHIPPING COMPANY, LIMITED (a corporation), claimant of the British steamer "Skipton Castle," her engines, tackle, apparel and furniture, and all persons intervening for their interest therein,

Appellant,

vs.

THE AMERICAN IMPORT COMPANY (a corporation), TILLMAN & BENDEL (a corporation), JAMES L. DE FREMERY and HENRI M. SUERMONDT, co-partners doing business under the firm name of Jas. de Fremery & Co., THE APOLLINARIS COMPANY, LIMITED (a corporation),

Appellees.

REPLY BRIEF FOR APPELLANT.

EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

Filed this.....day of August, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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REPLY BRIEF FOR APPELLANT.

I.

THE BURDEN OF PROOF RESTS UPON APPELLEES TO SHOW THAT THE DAMAGE WAS CAUSED BY THE NEGLIGENCE OF THE CARRYING STEAMER. THE SOUTHWARK DECIDES NOTHING TO THE CONTRARY APPLICABLE IN THIS CASE.

Despite all that appellees have said on the question of the burden of proof, the fact remains that, under the

John A. Bishop:

Q. Did you see the willow-ware?

A. I saw the willow-ware.

Q. In what condition was that?

A. It had a black mildew. The burlap that was wrapped around it was *decayed and rotted.*

Q. What was the condition of the willow-ware itself?

A. The willow-ware in places was also *decayed and rotted.* (Apos. 70.)

Thomas L. Brennan:

Q. Do you remember the shipment of willow-ware that came to your firm on the "Skipton Castle" some three years ago?

A. I do.

Q. Did you see it when it was taken out of the vessel?

A. I did.

Q. What was its condition?

A. It was in very bad condition.

Q. Describe it.

A. Well, the coverings on about half of the shipment of baskets were pretty well *rotted,* and a great many baskets were *rotted* so that you could break the willow-ware by putting your finger into the bundle; a good many of the others were black. I don't remember seeing any of them moldy. On some of the baskets there was a white deposit. (Apos. 73.)

Clearer testimony of damage coming within the exceptions of the bills of lading cannot be conceived, and, unless this court is to set aside the principle of law announced in

Jahn v. The Folmina, 212 U. S. 234; 53 L. Ed. 546, it follows that *the burden of proof is upon the shippers to establish that the goods were damaged by the negli-*

gence of the carrier. The rule which we invoke could not have been more unequivocally stated than by Mr. Justice White in the case cited, when he said:

> "Of course, *where goods are delivered in a damaged condition plainly caused by breakage, rust or decay, their condition brings them within an exception exempting from that character of loss,* as the very fact of the nature of the injury shows the damage to be prima facie within the exception, *and hence the burden is upon the shipper to establish that the goods are removed from its operation because of the negligence of the carrier.*"

This court enforced the rule in the late case of

The Dolbadarn Castle, 222 Fed. 838.

See also:

The Glenochy, 226 Fed. 971;
The Good Hope, 197 Fed. 149.

The decision in *Martin v. The Southwark,* 191 U. S. 1; 48 L. Ed. 65, cited by appellees, lays down no principle which removes the case at bar from the application of the rule in *The Folmina* and the other cases cited. *The Southwark* does not, as stated by appellees, dispose of *The Folmina* and supporting cases; nor can they be distinguished on the ground that in proving the ships within the phraseology of those cases it was not at the same time shown that the cause arose in making the vessel fit and seaworthy for the voyage. Those cases announce the definite rule that where goods are delivered in a damaged condition, plainly within an exception of the bill of lading exempting from that character of loss, the burden is upon the shipper to establish that the goods were removed from its operation because of

negligence of the carrier. The rule stands upon its own foundation and is applicable without exception where the damage plainly falls within the terms of the exceptions of the bills of lading.

In *The Southwark,* the court distinctly found, and upon it grounded its decision, that the cause of the damage was the *unseaworthiness* of the vessel (not a cause validly excepted in the bill of lading); and, having so found, simply held that the owner of the vessel had not sustained the burden of proving that he had exercised due diligence to provide a seaworthy vessel at the time he received the cargo and started upon the voyage. It is true that after having found that the damage was caused by the unseaworthiness of the vessel existing at the inception of the voyage, the court remarked, as cited by appellant:

> "It is argued that appellees are not claiming the benefit of the Harter Act, but rely upon the contract in the bill of lading to exempt them from liability in the affirmative proof of negligence.
>
> To permit the stipulations of this bill of lading to cut down the statutory requirements of Sec. 2 of the Harter Act would be to allow the parties to enforce a contract in violation of the positive terms of the statute. As was said by Mr. Justice White, of somewhat similar provisions in the contract before the court in The Kensington, 183 U. S. 263; 46 L. Ed. 190; 22 Sup. Ct. Rep. 102: 'It is apparent that they were void, since they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel, for all neglect in loading or stowing, and, indeed, for any and every fault of commission or omission on the part of the carrier or its servants.' "

This court will note that the Supreme Court did not, after having stated that which has just been quoted, continue in context as quoted in appellees' brief, but that which follows the foregoing quotation in appellees' brief (as though it so appeared in the decision of the Supreme Court) in fact appears in an earlier part of the opinion of the Supreme Court, so that the context in the opinion differs from that as printed by appellees. Nothing that the Supreme Court has said in that case in any way disposes of the rule subsequently laid down in *The Folmina,* for the damages in *The Southwark* were not shown to have come clearly within exceptions similar to those which gave rise to *The Folmina* decision, whereas, in the case at bar the damages are clearly within the operation of similar exceptions.

It is said by appellees (Brief, p. 3) that in *Martin v. The Southwark,* 191 U. S. 1,

> "The Supreme Court has squarely laid down that where the cause of injury excepted in the bill of lading concerns the matters controlled by Section 2 of the Harter Act, i. e., loading and stowage of the vessel and her preparation for sea, the fact that the injury falls within the exceptions of the bill does not shift the burden of proof, but that at all times the burden remains on the vessel to show seaworthiness and diligence in stowage."

As we read it, *the decision does not hold as appellees contend,* and does not affect that great line of decisions, both prior and subsequent to *The Folmina,* which sustain the rule laid down in that case. And that this court has not understood that in cases where the cause of injury excepted in the bill of lading concerns the matters

controlled by Section 2 of the Harter Act, i. e., loading and stowage of the vessel, the burden of proof is shifted upon the shipowner, is demonstrated by what the court said in

The Dolbadarn Castle, 222 Fed. 838, 840.

In that case, the damage was by sweat which the bill of lading excepted. It was contended that the sweat was occasioned by improper stowage, manifestly concerning a matter controlled by Section 2 of the Harter Act. This court, however, after referring to *The Folmina* case, and remarking that in that case the Supreme Court had cited the decision of this court in *The Henry B. Hyde,* 90 Fed. 114, wherein the burden of proof rule was followed, said:

> "That rule, sustained by abundant authority, was the rule which the court below applied in holding that *the burden of proof that the damage from sweat was occasioned by improper stowage was upon the libelant.* See The Koranna (D. C.) 214 Fed. 172; The Konigin Luise, 185 Fed. 478, 107 C. C. A. 578; The Good Hope, 197 Fed. 149, 116 C. C. A. 573; The Patria, 132 Fed. 971, 68 C. C. A. 397; The St. Quentin, 162 Fed. 883, 89 C. C. A. 573; The Baralong, 172 Fed. 220, 97 C. C. A. 24." (Italics ours.)

Notwithstanding that the matter therein concerned stowage, both the District Court and this court dismissed the libel *because libelants had not sustained the burden of showing improper stowage.*

Similarly, in *The Koranna,* 214 Fed. 172, the damage was by breakage, which was excepted by the bill of lading, and appellants claimed that the injury to the

casks was caused by negligent stowage, manifestly concerning matters controlled by Section 2 of the Harter Act. And yet the court held:

> "It is my conclusion that the libelants have not established their case by a fair preponderance of the evidence. It is well settled, I think, that, whenever damages which are attributable to causes excepted in the bill of lading are sustained in the transportation of merchandise, the burden of proof is upon the libelant to show that the loss occurred through the negligence of the carrying vessel as she is not permitted to exempt herself from the consequences of her negligence or lack of diligence and care in the transportation of property. The Lennox (D. C.) 90 Fed. 308; The Konigin Luise, 185 Fed. 478, 107 C. C. A. 578. *As this case is one where concededly the loss was from an excepted peril, the material question is: Was the custody, stowage, or care of the cargo, improper and fraught with misconduct amounting to negligence?* If the pipes of cocoanut oil in question were stowed at the beginning of the voyage in accordance with an established usage in transportation for a long voyage, then, giving effect to the printed bill of lading in evidence herein, providing that the carrier shall not be liable for drainage, leakage, breakage, contact with other goods, or for insufficient packing, the libelants are without remedy and cannot recover." (Italics ours.)

So it was in *The Baralong,* 172 Fed. 220, wherein the Circuit Court of Appeals for the Second Circuit said:

> "Under both bills of lading we think that, in view of the exception of damage from heat, *the burden rested upon the libelant to show that the carrier was negligent in stowing or ventilating the cargo, or otherwise.* This he failed to establish." (Italics ours.)

The decree was reversed and the cause remanded to be dismissed for failure to sustain the burden cast upon libelant by the exceptions.

See also to the same effect:

The Oceana, 171 Fed. 172, and
The Sao Paulo, 207 Fed. 51.

Furthermore, that the Supreme Court, in that portion of its opinion in *The Southwark,* quoted and italicized on pages 4 and 5 of appellees' brief, was referring to the burden of proof under the Harter Act, is made clear by that portion of the opinion omitted from the excerpt, as shown by the asterisks, quoted on page 4 of appellees' brief. That is to say, after having remarked as quoted in the brief immediately preceding the asterisks, the Supreme Court, Mr. Justice Day writing the opinion, said:

> "This case (referring to the decision of the lower court) was decided before the opinion was delivered in the case of International Nav. Co. v. Farr & B. Mfg. Co., 181 U. S. 218, 45 Law Ed. 830, 21 Sup. Ct. Rep. 591, and upon this point is in direct opposition thereto, and fails to give proper weight to the provisions of the act making it incumbent upon the carrier to use due diligence to provide a seaworthy vessel."

Manifestly, what the court was discussing was the burden of proof under the Harter Act, and not the burden of proof rule applicable to a case where the damages are shown to have been clearly within a specific exception in the bill of lading, such as breakage, heat, etc.

Likewise, the burden of proof to which the court referred in that portion of the opinion italicized on page 4 of appellees' brief, was the burden of proof under the Harter Act, and *not the rule which we are invoking under specific bill of lading exceptions.* This clearly appears from the Supreme Court's second reference, in its opinion immediately following the excerpt quoted by appellees, to *The International Navigation Company* case, which was considering alone the diligence required by the Harter Act.

The burden of proof rule which we invoke thus stands unshaken by anything said in *The Southwark.* It follows, therefore, having once shown, as appellant has done, that the damage to the merchandise here in question was of a character which plainly came within the exceptions of the bills of lading, the burden of proving negligence as the cause of the damage was shifted to appellees. This burden they have not sustained, and seek to avoid by a strained construction which they would have this court place upon the decision in *The Southwark.* They have not shown, and they cannot show, the inapplication of the rule in *The Folmina* to the case at bar. It was in failing to observe this rule that the District Court erred.

It is true, of course, that if the damage to the cargo was caused by the negligence of appellant in the loading, stowing, care or delivery of the cargo, appellant is liable therefor, even though such damage was shown to have been within the bill of lading exceptions. *But the fact that appellant may be liable under those conditions does*

not relieve appellees of the burden of proving the negligence, and does not shift to appellant the burden of proving that the damage was not occasioned by negligence.

The pertinent question, then, is: Does the evidence show the damage to have been caused by the unseaworthiness of the "Skipton Castle", or by the negligence of appellant? It does not.

II.

THE SKIPTON CASTLE WAS SEAWORTHY.

Appellees have not shown that the "Skipton Castle" was unseaworthy.

It is contended, however, that she was unseaworthy (A) because of the stowage of the bone meal in the lower hold in an inherent condition which caused it to heat, and (B) because of the fact that some of the hatch covers to the 'tween deck hatch were not laid.

(A) The contention that the vessel was unseaworthy because of the stowage of bone meal in an inherent condition which afterwards caused it to heat, in effect, *would make seaworthiness dependent upon the chance of the ship arriving at destination without her cargo heating.* Appellees, however, do not go so far as to say that the stowage of the bone meal *per se* would render a vessel unseaworthy because it possessed chemical properties which would, under certain conditions, bring about a heating, for if that were so, then every vessel

which carried the product, as, for instance, the Pacific Mail steamers on all of the voyages on which they transported it, would be unseaworthy. In other words, the contention in this regard is that the unseaworthiness arose from the condition of the bone meal, not from the structural condition of the ship or its equipment, yet every case cited by appellees, or of which we have knowledge, points to the fact that *seaworthiness has solely to do with the condition of the ship and its equipment as a vehicle of the sea, so to speak, by which cargo is to be carried.* This clearly appears from what was said by the Circuit Court of Appeals in

The Thames, 61 Fed. 1014,

a decision which was not only cited in *The Southwark,* supra, but was approvingly referred to by the King's Bench Division in

Rowson v. Atlantic Transp. Co., (1903) 1 K. B. 114.

The S. S. "Thames" was held unseaworthy, not because kerosene was stowed in juxtaposition with flour, but because of want of ventilation, as well as leaky decks. The unseaworthiness was a matter which flowed from the condition of the vessel itself, not from the nature or condition of the cargo.

It is thus apparent that the fallacy of appellees' contention in this regard lies in their failure to differentiate between a condition of hull machinery and equipment, and an unknown, but, perhaps, dangerous condition of cargo, innocently taken into the vessel. The former may be unseaworthiness, if the vessel is unfit to carry

her cargo, and the latter improper stowage, if the cargo's condition could be ascertained by due diligence, *but the latter certainly does not constitute unseaworthiness.*

By such a test the shipowner would be obligated not only to furnish a vessel that was in every respect staunch and fit in hull, machinery and equipment to carry safely the cargo with which she was loaded, *but to guarantee absolutely the sound condition of all cargo transported.*

If appellees' contention was sound, then, however great the care exercised to guard against stowing cargo which might turn out to be injurious to other cargo, the vessel would be unseaworthy, and, though the specific damage was covered by an exception in the bill of lading, just as in the case at bar, the shipowner would be absolutely liable, unless the bill of lading contracted against the warranty of seaworthiness. *To follow such an argument to its conclusion, would mean that seaworthiness of the vessel would not depend upon the care exercised by the owner in building and equipping and fitting his ship, but upon the chance that one species of cargo might not damage another on the voyage.* An owner might send, upon her maiden voyage, a vessel that was the last word in naval architecture, an "Imperator" or a "Brittanic", and yet, if because of an inherent defect in one kind of cargo, commercially and safely carried in all classes of vessels, it developed heat and thereby injured other cargo, the owner would be held liable, on this theory, not for improper stowage, but unseaworthiness.

Such, we submit, is not the law, and no case can be cited to it.

(B) Appellees fall into similar error, however, in their further contention of unseaworthiness that No. 1 'tween deck compartment was not seaworthy for the carriage of the mineral water, baskets and enamel-ware, stowed therein, because the 'tween deck hatches to the lower hold were not sufficiently tight to prevent the air of the lower hold, warmed by the heating bone meal, from reaching the 'tween deck compartment. It will be noted that the unseaworthiness is alleged to have consisted in the failure to completely cover the hatch so as to have prevented the hot air, produced by the heating cargo, from reaching the other cargo; not that the vessel would have been unseaworthy, even if the cargo had not heated and the merchandise had arrived undamaged. Thus, *the test which appellees would apply would require a vessel not only so staunch and fit as to safely transport her cargo under all conditions to be reasonably anticipated, but so constructed, equipped and arranged that if, perchance, part of the cargo was unsound it would not damage other cargo.* They would impose upon the shipowner the absolute guarantee that unsound cargo, innocently taken into the ship, would not damage sound cargo. *The now suggested test only differs from that first advanced in that the guaranty in the latter instance was against unsound cargo being loaded, while now it is that unsound cargo shall have been so separated from sound cargo as not to damage the latter, although the unsoundness was unknown despite the exercise of due diligence, and but for the unsoundness the separa-*

tion would not have been required. Both proposed tests have to do with unsound cargo, and require the shipowner to treat that which is normally sound and harmless as unsound and dangerous.

Seaworthiness of a carrying vessel, however, is not dependent upon a sound or unsound condition of cargo, *but upon fitness of hull, machinery and equipment to safely transport sound cargo,* for the presumption must be that, unless otherwise disclosed, the cargo to be carried is in sound condition as a commercial article. The same reasoning, therefore, which leads to the conclusion that a vesssl cannot be deemed unseaworthy because cargo was innocently loaded in so unsound a condition as to damage other cargo, makes it obvious that a ship cannot be deemed unseaworthy because unsound cargo, the condition of which was not discoverable by the exercise of due diligence, was not separated from other cargo so as to prevent damage resulting to the latter.

If the test of seaworthiness which appellees would apply should be given its full application, it would require a shipowner to anticipate a possible latent vice in all cargoes, and require him to have his ship so constructed, arranged and equipped that such unsound cargo could not, by any possibility, damage sound cargo. In other words, seaworthiness would require such staunchness and fitness of hull, machinery and equipment as not only to safely carry a cargo in its natural, sound condition, but so as to assure that no damage would come to other cargo if, perchance, without negligence on the part of the shipowner, or his employees, but

after the exercise of every diligence, cargo was taken aboard in a latent unsound condition. Such, however, is not the test of seaworthiness, for it would require the anticipation and prevention by the shipowner of an extraordinary, unusual and unexpected defect of cargo, not discoverable by the exercise of every diligence.

It is true that the warranty of seaworthiness is absolute unless contracted against under the provisions of the Harter Act. The test of seaworthiness, however, does not require such staunchness and fitness and arrangement of hull, machinery and equipment as shall assure safe carriage and delivery of cargo under all possible conditions, but only against those perils to the ship and cargo which are to be reasonably anticipated on the voyage. Inasmuch as the bone meal was not a substance likely to heat, the possibility of its heating was not to be anticipated. (Apos. 44-6, 55-60, 81-2, 223-8, 234-5.)

It must be admitted, for there is no evidence to the contrary, that the "Skipton Castle" would have been seaworthy if the bone meal had not heated. The alleged unseaworthiness is now said to have arisen through the fact that some of the hatches (which it pleases appellees to denominate the "bottom of the compartment", although the hatches formed but a small part thereof) were not on so as to have prevented some of the warm air, generated by the heat, from reaching the cargo. Nevertheless, even on this theory of unseaworthiness, it is admitted that she would have been seaworthy with the hatches off, but for the heating of the bone meal.

In other words, the ship was seaworthy until the cargo heated; then it was unseaworthy because the ship's structure (in this instance, hatches) was not so arranged as to prevent the heat from reaching the other cargo. Or, to go a step further, the vessel was unseaworthy because warm air from heating cargo reached and damaged other cargo. Now, if this were true in this instance, it would be true in all cases of heating cargo, or sweating cargo, and any damage to cargo from vice in other cargo, because it could make no difference, in point of principle, that in the present case it happened to be a hatch not entirely covered, for, in being so uncovered, the hatch was in the condition interior hatches usually are on board ship. Indeed, some ships have no laid 'tween decks at all. It can make no difference, then, that the medium by which appellees would have had the heat kept from the other cargo was the hatches; it was the fact that there was no such protecting barrier that, on the heat occurring, rendered the ship unseaworthy, according to the principle now invoked. On this theory, carried to its logical conclusion, the absence of a protecting barrier to other cargo, in case of the heating of a portion of the cargo, so as to have caused damage by heat, renders a vessel unseaworthy. If the cause of the damage was unseaworthiness, then the bill of lading exception against heat would not avail the ship as a defense. So that, if cargo is damaged by heating of other cargo, the exception against damage by heating is not a defense, but the fact that the heat reached the other cargo, and thereby damaged it, would render the

vessel unseaworthy. In other words, the heating which would give operation to the exception clause of the bill of lading against heating would coincidentally destroy it. The contention, of course, reduces itself to an absurdity in face of the fact that the courts have recognized the validity of the exemption against heat. Once it is admitted that, if the bone meal had not heated, the "Skipton Castle" was seaworthy with the 'tween deck hatches as they were (and there is not a vestige of evidence that she would then have been considered unseaworthy), then it follows that she could only be considered unseaworthy because the hatches were not there to prevent the heat from reaching other cargo. If she were thus unseaworthy, every ship, the cargo of which heated or sweated and damaged other cargo, would be unseaworthy because such heating or sweating had not been foreseen, although it may have been the wholly unexpected, and each kind of cargo so separated from every other that by no possibility could contaminating damage arise. Such a contention, of course, when followed to its logical conclusion, reduces itself, as we have said, to an absurdity.

If, as Bunker, the agent of the Pacific Mail Steamship Company, testified, bone meal is not known to heat in transportation and was carried in the steamers of that company by thousands of bags stowed with other cargo (coffee, tea, rice, matting, soy, saki and miso (Apos. 56-60)), certainly as subject to injury by heat as willow-ware and mineral water, without damaging such cargo with which it was stowed in juxtaposition, and was accounted good stowage, and the vessels were

not thereby rendered "unseaworthy," then it follows that if the bone meal and the mineral water and baskets had been stowed in the same compartment, whether lower hold or 'tween decks, it would have been good stowage, and the "Skipton Castle" would not have been rendered unseaworthy. This being true, then she was certainly not unseaworthy because all of the 'tween deck hatches were not laid in place. and the lower hold completely separated from the 'tween deck compartment. And, if she was not unseaworthy if the bone meal had not heated, she was not, because the hatches were not on, rendered unseaworthy by the bone meal heating. It is not a question of unseaworthiness at all, but solely of stowage. If the testimony of those who testified that bone meal was not likely to heat is to be given credence, then certainly there was no improper stowage.

Appellees' statement is inaccurate in its suggestion that No. 1 hold and the forward (No. 1) 'tween deck are intended for different kinds of cargo, each with a complete ventilator system, intentionally distinct from the other. While different kinds of cargo may. on occasion, be stowed on the same voyage in the two compartments, the latter are neither designed nor intended to be so used, for the same kinds of cargo may be, and certainly are, stowed in both. Nor are the ventilating systems intentionally distinct, save in the fact that the air from the lower hold passes naturally by upward draught through the ventilators from the 'tween deck to the upper deck, for the air from the 'tween deck and lower hold mixes in the same ventilating tube above the 'tween deck compartment, and does not pass in and out as a

separate current of air. In other words, the ventilating pipes from the hold telescoped into those from the 'tween decks, the lower tube being several inches smaller in diameter than the one above, and are not solid pipes through the upper deck, as proctor's statement leaves the impression. (Halliday, Apos. 81-8.)

The evidence does not support appellees' contention of unseaworthiness, for it is clear from all the testimony from which appellees have adroitly taken the portions quoted in their brief, that the witnesses did not intend to condemn, nor did they condemn, the "Skipton Castle," or any other cargo steamer, as unseaworthy for the carriage of mineral water, baskets and enamelware in No. 1 'tween deck, because the covers on the 'tween deck hatch leading to the lower hold were not tight. Deduction of unseaworthiness on that score is of appellees' own making.

It is plain from Captain Keame's testimony, in the portion from which appellees quote, that he was explaining that the ventilators described by him were designed and arranged to give the holds, both lower and 'tween deck, freest ventilation to the outside. Manifestly that is the purpose of any ventilating system. But even if the single excerpt from Captain Keame's testimony, which appellees have italicized (Brief pp. 10-11), be given its worst possible interpretation, it does not justify the conclusion that because the "Skipton Castle's" 'tween deck hatches were not tight, the vessel was to be deemed unseaworthy for the carriage of her cargo.

Nor is there anything to the contrary in Captain Halliday's testimony. In the portion which appellees quote, they subtly put in the mouth of the witness, words, which standing by themselves, would seem to convey the impression that the lower hold was necessarily warmer than the 'tween deck space. Had appellees, however, inserted in their brief (Brief p. 11), the portions omitted from pages 84 and 85 of the Apostles (Halliday, Apos. p. 84), they would have made apparent to the court that the meaning which appellees seek to convey was not intended by the witness, for the latter distinctly stated that *there was no material difference between the temperature of the lower hold and the 'tween deck.* Clearly what the witness was endeavoring to explain, was that the ventilator pipes gave free ventilation to both lower hold and 'tween deck; not that the lower hold was of higher temperature, as appellees would have us infer.

Similarly with the last excerpt which appellees take from the testimony of Captain Halliday. (Brief p. 12.) *Had they but quoted what immediately preceded* (Apos. p. 89), *it would have been clear that the fact of only sufficient hatches being on to make possible the stowage of cargo over the hatch, did not render the ship unseaworthy for the witness testified that 'tween deck hatches are not battened down, but put on simply to hold the cargo.* (Apos. pp. 38, 41, 86, 89.)

> Q. But your hatches are put on there to keep them apart?
>
> A. Yes, they have hatches on, but *they are never battened down.*

Q. They are not battened down, but they are on there so as to prevent the circulation of air between the two spaces?

A. *They are on there to stow cargo on top of,* not to circulate the ventilation at all. *The hatch is to stow the cargo on top of.* (Apos. 86.)

If unseaworthiness existed because the passage of air through the hatch, from the lower hold to the 'tween decks was possible, then, unless the hatches *were battened down,* such unseaworthiness would always be present, for, if not air tight, there would necessarily be more or less draught of air through them. The fact that Captain Halliday did not ventilate through the 'tween deck hatches, but depended solely upon the ventilator pipes, afforded no evidence that hatches laid as the "Skipton Castle's" were unseaworthy.

Appellees also state (Brief pp. 8, 12) as a fact that the mate admitted that warm air arising from the hold below would ventilate through the few boards that were put on. If appellees meant by that that part of the hot air produced in the lower hold by the heating of the bone meal, doubtless they were correct, for unless the hatches were battened down air tight, some of the warm air would certainly reach the 'tween deck compartment. If, however, appellees intended to leave the impression that the lower hold is normally warmer than the 'tween deck, so as to require the hatches to be battened down, their assertion is again without evidentiary support. If appellees' statement related solely to the fact of the passage of warm air from the heating bone meal, then it is entirely beside the question, for that assumes the necessity of arranging a ship and her

cargo against unusual and unforeseen conditions not likely to arise. Such is not the requirement of seaworthiness, for *if a ship may be held seaworthy even if she fails to ride out safely weather so extraordinarily severe as not to be reasonably anticipated, she cannot be held unseaworthy for not anticipating that a cargo of bone meal, a product not likely to heat, will heat because of an unsound condition.* No testimony of the mate, therefore, tends to prove unseaworthiness.

To the same end, we may ask wherein is there any evidence to support the conclusion of appellees:

> "Of course to make this separate ventilation effective, the hatch between the 'tween decks compartment must be closed"? (Brief p. 12.)

The record contains none, but, on the contrary, it clearly appears that it is not customary to lay in place all of the 'tween deck hatches. *The whole object of ventilation is the securing of a free circulation of air, and that it is prevented by 'tween deck hatches not being tightly laid down is not shown or suggested by any evidence.*

If appellees were so strongly of the opinion that the "Skipton Castle" was unseaworthy because her 'tween deck hatches were not laid tight, why did they not adduce some evidence of that fact from the many experienced witnesses who testified by an interrogation addressed to the point, so that the court might have had the assistance of their practical views? Or, better still, why was not some expert on the care of cargoes and ship construction and management, so available in the port of San Francisco, called, and the court given the

advantage of his knowledge of the requirements of seaworthiness, rather than leaving the matter to the forced inference of appellees? The failure to produce any evidence upon the question by their own efforts, or to frankly ask the opinion of the expert witnesses who testified, cannot be attributed by appellees to want of knowledge as to the condition of ship or cargo, for it was fully known to them nearly three years prior to the trial.

The conclusion of appellees rests alone upon their assertions. If this conclusion were sound, then every ship on which the under deck hatches were not tightly laid would be unseaworthy. Were this true, some evidence of that fact would have been easily obtainable, and appellees would not have been forced to the necessity of advancing their own opinion as though it were evidentiary.

In contradiction to the assertion of appellees, it appears from the testimony of Captain Woodside, an old shipmaster and experienced stevedore, *that it is not customary to fasten down the 'tween deck hatches so that they are air tight.* On the contrary, he has seen vessels "lots of times" come into port with the 'tween deck hatches laid so as to leave an open space between the hatches to give a free ventilation of air. (Apos. p. 47.) Captain Halliday similiarly stated that *he never battened down his 'tween deck hatches, and never saw them battened down in a ship; that the hatches were put on simply to hold cargo, so that cargo might be stowed on top of them.* (Apos. 89, 90.) *This*

was not controverted by any evidence offered by appellees.

Neither was there any evidence to support appellees' statement (Brief p. 12) that "all the lower holds are affected by the vessel's boilers and furnaces, etc." It may be that the temperature of those holds adjacent to the boilers, and those abaft the boilers, would be somewhat increased, though the opinions of the various masters differed, but certainly none of them testified that *all* the lower holds were affected by the boilers and furnaces. And particularly was this true as to No. 1 lower hold, with which we are alone concerned, for, manifestly, heat from the boilers could not pass forward against the air pressure caused by the ship's headway. This was clearly pointed out by the master and mate. (Apos. 134-5, 171-2, 199.) The boilers and furnaces cannot be rightly advanced, then, even as inferentially suggesting that the No. 1 'tween deck hatches should have been tightly closed so as to shut off a supposed heat from the lower hold. (See Baird Apos. 238-9, 240-1; Halliday Apos. 85-6.)

The fact is that the evidence shows the "Skipton Castle" to have been a modern cargo carrying vessel, complete in every detail of her equipment. Unfortunately, but without any fault on her part, a portion of her cargo heated from an unknown cause, and the heating thus occurring damaged cargo stowed on the deck above. Nevertheless, the damage to the 'tween deck cargo is not to be attributed to a so-called "failure to complete the ship's structure" by laying the 'tween deck hatches tight, for there is no evidence that the

ship's structure, or arrangement of her under deck hatches, were in any different condition than as customary in cargo carrying vessels, or as required to safely carry sound cargo. *If not, then the ship was seaworthy, unless seaworthiness is to be measured by a test which requires the shipowner to make certain that cargo unsound by an undiscoverable defect will not damage sound cargo.* The efficient cause of the damage was the heating of the bone meal, for there is neither evidence nor suggestion by any one possessed of knowledge that the 'tween deck cargo would have damaged but for such heating.

Whether some of the air of the lower hold, heated by the bone meal, gained access to the 'tween deck compartment by passing through the space left between the 'tween deck hatches and amongst the cargo stowed thereon, or whether the increase of temperature in the 'tween deck compartment was caused by the heating of the steel 'tween deck, ventilators and structure of the ship, is not shown by the evidence. But whether one or all contributed to the heating, *it remains a settled fact that the "Skipton Castle" was staunch and fit in every detail for the carriage of all of her cargo had it been in sound condition.* And that certainly was the test of her seaworthiness.

Once it is granted that there is no evidence to show that the cargo would still have arrived damaged by heating, even though the bone meal had not heated, and there is a complete failure of such evidence, then it follows that the ship was not unseaworthy for the carriage of her cargo in sound condition, *unless sea-*

worthiness required that she be so fitted and arranged that an undiscoverable defect in one specie of cargo, if it existed, could not result in damage to other cargo. To hold the ship liable for damage to sound cargo by an undiscoverable defect in other cargo is, in point of principle, no different than holding her responsible for the damage to cargo by its own inherent defect, for the one no more than the other does not result from a wrong chargeable to the owner. Yet the Harter Act (section 3) expressly excepts him from such latter liability, for it provides:

> "that if the owner of any vessed * * * shall exercise due diligence to make the said vessel in all respects seaworthy * * *, neither the vessel, her owner or owners, * * * shall become or be held responsible for damage or loss resulting from * * * *the inherent defect, quality or vice of the thing carried,"* etc.

If the existence of a defect in cargo, and the fact that a hatch cover, customarily not laid, was not on, and other cargo was thereby damaged by the unsound cargo, made the carrying ship unseaworthy, then the terms of the Harter Act would be self-contradictory under its settled construction, for it does not, apart from a special contract, exempt the owner from liability for unseaworthiness. The very fact, however, that the Act exempts the shipowner from liability for damage resulting from inherent defect of cargo, providing he has exercised due diligence to make his ship seaworthy, clearly indicates that under the Act seaworthiness of vessel is independent of condition of cargo. *Seaworthiness, then, is not to be tested by a requirement which*

would guarantee that sound cargo would not be damaged by an undiscoverable defect in other cargo. The test must be as to whether or not the vessel is, in every way, fit to carry the cargo as it is known to be in its sound condition as a commercial product.

We believe we are safe in saying that no case can be found in which the test of seaworthiness, which appellees would prescribe, has been applied. On the other hand, a ship may be seaworthy although she is not of sufficient staunchness to weather an extraordinarily severe gale of wind without damaging her cargo.

The Hyades, 124 Fed. 58.

Why? Because seaworthiness only requires a staunchness and fitness *to meet the anticipated, not the unexpected.* And if this be true as to the seaworthiness of a vessel with respect to the seas she may encounter, why is it not, in point of principle, equally true with respect to her cargo? If the damage in question had resulted from a condition of cargo which might have been reasonably expected to develop, then it should have been safeguarded against, or, better still, the cargo should never have been taken aboard. But when it was caused by the heating of cargo which all the evidence shows is not known to heat, and, therefore, a heating not to be reasonably anticipated, then to hold the shipowner responsible for the damage would be to apply a test of seaworthiness far more drastic than that universally accepted.

The cases cited by appellees do not sustain their contention in any particular. For instance, in the ex-

cerpts from *The Caledonia,* 157 U. S. 124, italicized in appellees' brief (p. 18), the shipowner's undertaking is described as that "the ship is really fit to undergo the perils of the seas, and other incidental risks *to which she must be exposed* in the course of her voyage". What the court contemplated as being included in the perils and risks to which a ship *must* be exposed is made clear by the court's quotation from Parsons on Insurance, in which seaworthiness is, in effect, defined as such suitable condition of a ship as enables her "to proceed and continue on that voyage, and to encounter all common perils and dangers with safety". It is not that she shall be able to withstand *all* perils arising, but all *common* perils and dangers; no more than should she be required to safely deliver her cargo against *all unexpected and not to be anticipated* defects therein. It is true that the court held that the warranty of seaworthiness is absolute, but *it did not prescribe a test of unseaworthiness which would make the ship proof against unanticipated risks and dangers.*

Neither *The Carib Prince, The Silvia, nor International Navigation Company v. Farr & Bailey Mfg. Co.* lay down any rule upholding the test of seaworthiness which appellees would apply. While they hold that the obligation of the owner to furnish a seaworthy vessel is absolute, they prescribe no test any more rigid than that by which we admit the seaworthiness of the "Skipton Castle" should be determined. For instance, in *The Silvia,* it was said:

> "The test of seaworthiness is whether the *vessel* is reasonably fit to carry the cargo which she has undertaken to transport."

The "Skipton Castle" undertook to carry bone meal, a product not known to heat or to damage other cargo. It was thus proper cargo to be stowed in juxtaposition to mineral water, etc. (see Bunker's testimony, Apos. 55-60), and by such test should the "Skipton Castle's" seaworthiness be adjudged. Had the bone meal been in commercially sound condition, the "Skipton Castle" was reasonably fit to carry her cargo. But, unfortunately, the bone meal was in an unsound condition, though that fact was not known to the officers or crew of the ship, or employees of appellant. To hold, then, that the "Skipton Castle" was unseaworthy as appellees contend, would be to test her fitness not by the cargo she had undertaken to transport, but by a cargo of a different character, to wit, one affected with an undiscoverable defect. This was not the test prescribed in *The Silvia.*

We are in thorough accord with everything that is said in *The Thames,* cited by appellees. When due consideration is given to the testimony of Mr. Bunker as to the experience of the Pacific Mail Steamship Company in the carriage of bone meal, and to the evidence adduced from the other witnesses who had personal experience in its transportation, it cannot be said that the "Skipton Castle" was unfit to carry that product, together with mineral water, baskets and enamelware. If bone meal could be safely carried with coffee, tea, matting and rice, etc. (Apos. pp. 56, 60), how can it be argued that the "Skipton Castle" was unseaworthy with the bone meal (if it had been undamaged) stowed in the lower hold, and the bottles (glass), baskets (wood)

and enamelware (iron) stowed in the 'tween decks above, because the 'tween deck hatches were not laid sufficiently tight to prevent the passage of air from the hold to the 'tween deck compartment? When the bone meal and mineral water, baskets and enamelware were received on board the ship, the "Skipton Castle" was certainly fit to carry that merchandise, as customary and well known articles of commerce. And that is all that is prescribed in *The Thames* as the test of seaworthiness. The damage resulted *not from the unfitness of the ship to safely carry the cargo with which she was supposed to be loaded, but from an unsoundness in part of her cargo that was not discoverable by the exercise of every reasonable diligence.* Either the "Skipton Castle" fulfilled every requirement of seaworthiness, or seaworthiness must include an absolute warranty that the ship is so constructed that unsound cargo, innocently taken into the vessel, cannot by any possibility, damage sound cargo. *No case of which we are aware prescribes such a test.* Certainly *The Thames* does not.

So it is with *The Indrapura.* The test is as to fitness to carry each particular article well known to commerce. Bone meal likely to heat is not so known; bone meal unlikely to heat is an article well known to commerce, and was the article which all concerned believed was loaded on board the "Skipton Castle". She is, therefore, to be judged by that article, and not by the fact that it developed heat from an unknown cause.

In none of the remaining cases cited, *The Southwark, Tattersal v. Nat. S. S. Co., Rowson v. Atlantic Trans-*

port Co., or *American Sugar Ref. Co. v. Rickinson* was any different rule promulgated. In none of them, where the ship was held unseaworthy, was the damage to sound cargo caused by another portion of the cargo developing an unsoundness. But the damage resulted from an unfitness, in one particular or another, of the vessel or her equipment to safely carry the sound cargo with which she was loaded.

If the experience of those who have transported bone meal counts for anything, it proves conclusively that it was not a substance known to heat. Except for its heating due to an unsound condition, the entire cargo in the lower hold and in the 'tween decks would have arrived safely, so far as the evidence discloses. The cause of the damage, then, was not an unfitness to carry the cargo with which the "Skipton Castle" was reasonably believed to be loaded, but an undiscoverable defect developing in part of her cargo.

Appellees say that hermetically sealing by tarpaulins of the 'tween deck hatch was not necessary as the fine ventilator system for the hold below would have taken care of the hot air had not the large hatch opening drawn the air by another channel. *There is no evidence to such effect in the record;* and that the hot air was not drawn away from the ventilators is evidenced by the fact that all of the temperatures were taken in the ventilators of the lower hold. (Apos. 188-9.) No witness testified that if the hatch covers had been laid without being battened down, the ventilators would have drawn off the hot air of the heating bone meal. It is true

that the hold was exceptionally well ventilated, but when appellees assert that the ship was unseaworthy because hot air from the heating bone meal would pass into the 'tween deck compartment, such conclusion, if sound, would require that such passage of air be stopped, and that could only have been done by *battening down* with tarpaulins. In the absence of any testimony from any witness that the carriage of bone meal in the lower hold, and mineral water, baskets and enamelware in the 'tween decks, required such separation, with the cargo in sound condition, the contention of appellees must fail. If such battening were necessary, it could have been easily ascertained from the various experienced witnesses by a squarely propounded question. That such battening, however, was not required for the safe carriage of those well known articles of commerce is too clear from the evidence, and especially from Mr. Bunker's and Captain Halliday's testimony, to admit of question.

It is said by appellees (Brief, p. 9) that we stated and reaffirmed that there was no evidence in the record that it was customary to complete the forward between deck compartment by laying the planking of the hatch or otherwise closing it by boards or canvas. What we said upon the trial, and now reiterate, was, that *there is no evidence in the record even tending to show, let alone establishing, that the "Skipton Castle", or any other vessel, was unseaworthy because all of her 'tween deck hatches were not laid in place;* and, indeed, the evidence shows to the very contrary, that it is not custo-

mary to close the hatches, for the testimony of Captain Woodside, an independent witness, engaged in the business of loading and discharging vessels in the port of San Francisco, was that hatches are frequently left open (Apos. p. 47), and the testimony of Captain Halliday clearly establishes that they are put on simply to hold cargo, so that cargo may be stowed on top of them (Apos. 86, 89).

Again, it is stated (Brief, p. 13) that the failure to make the hatch tight, a matter of ship structure, was the *causa causans* of the loss. We say most emphatically that the evidence does not establish the assertion of appellees. The evidence does not show that any quantity of the warm air, created by the heating of the bone meal, passed into the 'tween deck compartment through the 'tween deck hatch and caused the damage in question. So far as the evidence discloses, all of the warm air that may thus have entered the 'tween deck compartment passed upward by natural draft through the open upper deck hatch; and, furthermore, so far as any of the evidence shows, the entire damage may have been, and most likely was, caused by the heating of the steel deck and steel ventilators, on which and around which the mineral water and baskets were stowed. Much is said throughout appellees' brief of the flooding of the 'tween deck compartment by the streams of hot air from below. No one testified to such condition, and there is no evidence to justify such extravagantly reckless assertions.

The fact that appellees thus strain at the evidence in the record points to the importance, in this case, of the question of the burden of proof. With the burden of proof upon appellees, to show that the heating of the bone meal and the breakage, rust and decay of the merchandise was caused by the ship's negligence, *such negligence must be established by evidence and not by bald assertions unsupported by any evidence.*

It is also suggested that the bursting of the mineral water bottles could not have been caused by the heating of the steel deck and ventilators, because of the deck being dunnaged. Unquestionably the usual dunnage was used to raise the cargo from immediate contact with the deck, as was customary (Apos. 130), so as to protect the cargo from any sweat that might occur, and to admit of a freer circulation of air about the cargo, but that dunnage would not, *and there is no evidence in the record to show that it did,* prevent the steel decks and ventilators from conducting the heat of the lower hold to the 'tween deck compartment. And, further, it is urged that any warmth that might have come through the steel decks would have been taken care of by the four large ventilators. Ultimately so, of course, but not until it had been diffused about the cargo and had heated the mineral water around which the heated air necessarily circulated from the deck in rising to the ventilator openings at the top of the compartment.

Again, it is stated that such warm air as passed through the 'tween deck hatches would not pass upward (as heated air does), through the open hatches of

the upper deck, but that the ventilators, especially constructed for the intake and outflow of air, would bring the hot air of the lower hold over to them, and hence to the explosive mineral waters stowed beneath them. There is no evidence showing such a circulation of the warm air, and, indeed, common knowledge teaches that it would rise to the top of the compartment and pass out of the upper hatch, or, if that was closed at night, as counsel suggests, then it would pass along immediately beneath the upper deck above the cargo to the opening in the 'tween deck ventilators at the top of the compartment.

Furthermore, it is said that it was the alternations of heat and cold that broke the bottles whose waters dampened the air and caused the moulding of the baskets and the rusting of the ironware. There is no evidence that it was the alternations of heat and cold. The breakage of the bottles resulted, as was clearly shown by the representatives of the owners of the mineral waters, from the heating of the bone meal, causing the mineral water in the bottles to throw off the gas with which they were charged, and so increase the pressure as to burst the bottles. Whatever cold air may have reached the bottles only had the effect of driving the gases back into the water, and, thereby, relieving the pressure. This is clearly shown by the evidence of the expert water men.

The evidence establishes beyond peradventure that the "Skipton Castle" was seaworthy, and shows the damage to have been breakage, decay, rust, wastage

and damage to wrappers, caused by the heating of the bone meal. Appellees have not sustained the burden of proving a loss by unseaworthiness, or by negligence. But their wildly extravagant statements, unsupported by any evidence, demonstrate the importance to be attached by the court to the burden-of-proof rule.

III.

THERE IS NO EVIDENCE TO SHOW THAT THE DAMAGE TO THE CARGO WAS CAUSED BY NEGLIGENCE EITHER IN ITS STOWAGE OR CARE AND CUSTODY.

(A) Stowage.

It was said by District Judge Hazel in *The Koranna,* supra:

> "It is my conclusion that the libelants have not established their case by a fair preponderance of the evidence. It is well settled, I think, that whenever damages which are attributable to causes excepted in the bill of lading are sustained in the transportation of merchandise, the burden of proof is upon the libelant to show that the loss occurred through the negligence of the carrying vessel as she is not permitted to exempt herself from the consequences of her negligence or lack of diligence and care in the transportation of property. The Lennox (D. C.), 90 Fed. 308; The Konigin Luise, 185 Fed. 478; 107 C. C. A. 578. As this case is one where concededly the loss was from an expected (excepted) peril, the material question is: Was the custody, stowage, or care of the cargo improper and fraught with misconduct amounting to negligence? If the pipes of cocoanut oil in question were stowed at the beginning of the voyage in accordance with an established usage in transportation for a long

> voyage, then, giving effect to the printed bill of lading in evidence herein, providing that the carrier shall not be liable for drainage, leakage, breakage, contact with other goods, or for insufficient packing, the libelants are without remedy and cannot recover."

Applying the doctrine of that case and similar cases, appellees cannot recover herein unless they have shown by a fair preponderance of the evidence that the cargo was not stowed at the beginning of the voyage in accordance with an established usage in its transportation for the kind of a voyage on which the "Skipton Castle" was about to proceed. This, admittedly, they have not done, for no one has testified that the stowage was improper. The cargo was stowed under the supervision of Captain Baines, a world-renowned surveyor of cargoes in Antwerp, and, also, under the supervision of the chief officer of the "Skipton Castle," a man who had been going to sea for twenty years and had been a ship's officer in practically all of the world's great trades. Those men, together with every other witness called who was questioned to the point, testified to the proper stowage of the cargo. (Apos. pp. 46, 82, 119-120, 134, 137, 159, 167, 168, 171, 175, 178, 216-217, 240.)

It is contended by appellees that there was improper stowage of the mineral waters in No. 1 'tween decks, because, it is said, the mate's admissions show that for this season of the year it was probably the hottest compartment of the ship. We submit that the testimony of the mate admits of no such interpretation. In an honest endeavor to account for the heating of the bone meal,

he could only explain it through the possibility of the forced shutting off of the ventilation during heavy weather. But the evidence, not only of the mate, but of every other witness called, who was questioned to the point, clearly established that the No. 1 'tween decks was as good as any compartment in the vessel, if not the best, in which to stow the goods. Furthermore, the temperatures recorded were not taken in No. 1 'tween decks, but at the bottom of the ventilator to the lower hold.

Again much is said about alternating hot and cold blasts being taken in through the ventilators, but, in this respect, if there was such a thing, No. 1 'tween deck compartment and No. 1 lower hold experienced less of it than any other place in the ship.

With all of the assertions that the stowage was bad, appellees called no witnesses who testified as to how a better stowage could have been had, or that the stowage was not as customary. And, now, appellees endeavor to avoid the consequences of their failure to sustain the burden cast upon them of showing improper stowage, if the rule in *The Koranna* and other cases is to be adhered to, by an unwarranted construction which they seek to place upon *The Southwark.*

We submit that, if the rule in *The Koranna* is good law, this Court cannot find that appellees have sustained the burden of proof resting upon them of showing improper stowage. On the other hand, the evidence, in fact, clearly establishes proper stowage.

(B) Appellees Have Not Sustained the Burden of Proving That the Damage Was Caused by Negligence in the Care and Custody of the Cargo.

(1) *During Loading.*

It is said by appellees that the log shows that there was no inspection of the cargo and holds during any stage of the stowage or after stowage, just before the sailing of the vessel, and, further, that there was no evidence of any kind of diligence in inspecting either No. 1 hold or the forward between decks during or after loading and cargo in it. (Brief p. 26.) *Accepting that statement at its face value, it conclusively establishes that appellees have not sustained the burden of showing that there was negligence in the care or custody of the cargo.* To avert it, appellees again advance the contention that the burden of proof is not upon them, quoting from *The Southwark* a portion of the opinion that referred to the burden resting upon the owner of showing a vessel to be seaworthy in a case where the damage was found to have been caused by unseaworthiness. The Supreme Court, as we have previously pointed out, was not, in that case, considering the question of burden of proof in the light of special exceptions in the bill of lading exempting the owner from liability for the particular character of damage suffered, as breakage, heat, decay, etc.

So it is with the other cases cited on pages 26 and 27 of appellees' brief. What the courts in those cases have to say is not in point on the question of the burden of proof under the rule applicable in this case.

In *The Wildcroft* and *The T. & F. Lupton,* the courts were concerned alone with the burden of proof under the Harter Act, and in *The Tenedos* and *The Phoenicia,* the damage was caused by the entrance of sea water through unseaworthy ports. In none of the cases was the burden of proof considered with respect to damage clearly within specific bill of lading exceptions. They do not, therefore, detract from the force of the rule laid down in *The Folmina, The Dolbadarn Castle, The Koranna,* and similar cases.

It is said by appellees (Brief p. 27) that a reasonable master would certainly think it necessary either to use a thermometer in the holds, or at least to go down into the hatch of the between decks and observe from his own sense of heat and cold whether there was a normal temperature. We ask why, when the evidence clearly shows that bone meal was an article not known to heat in transportation, as the evidence conclusively shows? No one testified that prudent care of the cargo required the master to do as appellees now, *after the event,* suggest that he ought to have done. If a proper care of the cargo required a thermometer test to be made of the holds, in which no cargo likely to heat was being stowed, in the course of the loading, as suggested by appellees, then evidence of that requirement should have been adduced. Without any evidence in the record bearing upon it, appellees cannot sustain the burden of proof resting upon them by mere opinion of counsel.

It is further said that the log shows a complete absence of any inspection. While appellees are mis-

taken in this assertion, *it would only amount,* if it were true, *to a failure on their part to sustain the burden of proof resting upon them.* The fact that the log may have been silent upon the matter of inspection does not, of itself, prove that no inspection was made in port, for logs are not kept with the same degree of care during the process of loading as when the ships are being navigated at sea, as evidenced by the brevity of the present log. The fact that the mate may not have made in his log detailed entries of everything that was done in respect to the cargo during the process of loading, *does not constitute evidence available to appellees to sustain the burden upon them.*

It is interesting to note the extreme to which appellees have gone on page 28 of their brief, in attempting to stretch the evidence. It is said that the log shows number one hold had contained this animal fertilizer, ground bone with fat and meat adhering, for some ten days before sailing. We find nothing in the log which so describes an animal fertilizer. The log, of course, mentions the loading of the bone meal, but all the frills, as to animal fertilizer, ground bone with fat and meat adhering, are of appellees' making. Then, it is said that if it was heated to the extent found four days after sailing, can it be said that during the ten days while the vessel was lying at the dock with no motion to force the ventilation it had not heated to an extent discoverable on inspection with the utmost care and diligence? They further question as to whether it was not so heated at sailing time that any mere casual inspection would have discovered it? Was it not warm

enough so that mere standing in the between decks in the open hatch would have detected it? Our answer is that *so far as the evidence discloses it could not have been, for the record shows that the cargo was stowed under the supervision of the mate and the surveyor Baines, and does not show that either of those men, or any of those actually engaged in loading the ship, detected any heating.* The very fact, however, that appellees propound the questions that they do shows a consciousness that *they have failed* to produce any evidence that the bone meal was heating at the time suggested, or that there was any negligence in the loading or care of the cargo.

The evidence on the contrary shows that there was not the indifference to the cargo which appellees would have the court believe. For instance, first officer Page testified as to the ventilation in port:

> Q. Are you sure you did everything you could to ventilate this No. 1 hold?
>
> A. Everything possible.
>
> Q. While you were loading the vessel in Antwerp?
>
> A. Yes, sir. (Apos. p. 146.)
>
> * * * * * * *
>
> Q. Could you have done anything to get any more ventilation in that space than you did at Antwerp while you were lying there?
>
> A. Say that again.
>
> Q. Could you have done anything more than you did at Antwerp to get ventilation into that space?
>
> A. No, sir. (Apos. p. 152.)

As for not taking temperatures while in port, he explained that the hatches of the vessel were off at all times during fine weather:

> Q. You do not take the mean temperatures while in port when you are loading? It is only when you get out to sea that you take the temperatures?
>
> A. Principally at sea. I do not think I took them in port. I am not quite sure. When we are in port, as a rule, all the hatches are off fore and aft, and discharging is going on, or loading. The whole time we are in port the hatches are off if it is fine weather.
>
> Q. That is the reason you did not take the temperatures while you were in Antwerp, was it not?
>
> A. Yes, sir. (Apos. p. 144.)

That the stowage of the cargo was superintended and watched by the mate and the surveyor, Baines, and that the cargo was in good condition clearly appears from the following:

> Q. I do not imagine that you handled any of this cargo yourself; stowed any of these packages and put them in yourself, as mate? A. No, sir.
>
> Q. That was done by the stevedores?
>
> A. Yes, sir. We superintended it and watched it.
>
> Q. As a matter of fact, the chief man in that is the local stevedore? He is the chief man who stows the cargo?
>
> A. This Captain Baines, he stowed the cargo. The captain and I were also superintending the stowage of it. (Apos. p. 145.)
>
> * * * * * * *
>
> Q. Did you see this bone-meal when it was loaded?
>
> A. Yes, sir, I see the bone-meal.
>
> Q. What condition was it in?
>
> A. In apparently good condition.
>
> Q. Was it damp or wet? A. No, sir.

Q. Did you handle any of the sacks yourself?

A. Yes, sir.

Mr. DENMAN. He said he did not in his direct examination.

Mr. CAMPBELL. He did not say that.

Mr. DENMAN. Q. I asked you if you touched any of the cargo yourself.

A. The question you asked me, if I may interrupt, was did I handle the cargo. You meant to say, as I understood it, did I load any of the cargo myself. I went around and looked at all the cargo as it came in the ship, when it was on the quay.

Mr. CAMPBELL. Q. Did you examine it?

A. Yes, sir, *I examined practically all the cargo, everything that was taken in.*

Q. *In what condition did you find this bone-meal that was taken in No. 1 lower hold?*

A. *In apparently good condition.*

Q. *Was it wet?* A. *No, sir.* (Apos. pp. 190-1.)

* * * * * * *

Q. You felt all the bone-meal bags to see if they were or not?

A. No, sir, but I walked over a portion of them and had my hand on a number of them.

Q. What made you put your hand on them?

A. Just knocking about the wharf, probably leaning on them looking after other things going in, and I was covered with bone-meal, knocking around on the wharf, when it was taken off in the carts and stored in the shed. (Apos. p. 195.)

* * * * * * *

Q. You depended on your notes when you made that thing up, didn't you?

A. I depended on my notes. On the general outline I have, a very good idea as the thing goes along. I can remember quite a number of things up and down the holds and in the shed, watching things coming down and puttering about the whole day; not only myself, but *the second and third officer is watching the cargo in each hold.*

Q. This was made up in part then from the information that you got from the second and third officers? A. No, sir.

Q. It was not?

A. No, sir. I might ask them a question now and then.

Q. As to where the cargo was stowed, you mean?

A. If they were putting down something in No. 4 hold and I wanted to get down No. 1 to see anything, I would probably sing out to the officer, "Where are they putting down that stuff. Are they putting it on the fore part?" or any other part of the hold that they were putting it in, so that I should know; and when I came up from No. 1 *I would go down No. 4 and look at it.* (Apos. pp. 207-8.)

We respectfully submit that the evidence does not show any negligence in the care and custody of the cargo during loading. On the contrary, the uncontroverted evidence is that it was stowed under the eyes of ship's officers and surveyor Baines and that the cargo was in good condition.

(2) *On the Voyage.*

With the burden of proof upon them to show that the cause of the heating, breakage, rust, decay, etc., was negligence, appellees are not entitled to any relief upon the "supposition" that the damage could have been averted by moving and raising such portion of the cargo as was on the square of the hatch, and by closing the hatch between No. 1 'tween decks and No. 1 hold, "so that the hot air of the latter might rise through the ventilators without reaching the 'tween decks", as assumed by the District Court.

There was no evidence, as we have pointed out in our opening brief (pages 13-25), that such moving and raising could have been done; indeed, *the master states to the contrary, that he could not do anything; that there was no place to take the cargo out.* (Apos. 186.) Appellees say that the photographs of the deck show otherwise, *but no witness so testified.* Now, the courts take judicial notice of some facts, but we are yet to hear of any court taking judicial notice with respect to the navigation and management of a vessel at sea. How then, can this court say that want of care has been established by a fair preponderance of the evidence, as *The Koranna* held was required to sustain a similar burden of proof, when no witness so testified? The court cannot substitute its inference upon a subject, as to which there is no evidence to sustain the inference and as to which it cannot take judicial notice. On what evidence, we ask, can this court place its judicial finger and say that it *proves* that the damage would not have resulted if the cargo on the square of the hatch had been raised and moved and the hatch closed? We submit that there is none, and, being none, certainly the burden of proving the fact has not been sustained by appellees.

By what evidence can this court say that it is established that the damage was not done by the heating of the bone meal being transmitted to the 'tween deck compartment through the steel deck? Absolutely none, for, so far as the evidence discloses, the damage may all have been caused in that manner. This being true, how, then, can it be said that the damage was caused by the hatch not being closed on discovery of the heat-

ing? *It cannot be said, and the impossibility of saying it is an admission that the burden of proof has not been sustained.*

To what evidence in the record can this court point showing that it would have been proper and practical, with all the attending risks of the sea and of inclement weather and storms, to move the carge from the 'tween decks to the exposed weather deck? There is no evidence of it, and it certainly is not a matter of which this court can take judicial notice. The only evidence before the court is that of the master, to the very contrary. *How, then, can it be said that a fair preponderance of the evidence shows that it was an improper care of the cargo not to have done so, and that, if it had been done, the damage would not have occurred?* It cannot be said!

Without evidence of improper care, this court will not deny to appellant the benefit of the rule which this court gave to the "Dolbadarn Castle"! If it does why the discrimination? If it accords to appellant the benefit of the rule, as it certainly should under the evidence, then *it must find that the burden of proof that the damage was caused by negligence is upon appellees and that it has not been sustained.*

Appellees speak of abortive measures; stamp as neglect that which was done; say that the heating of the 'tween deck compartment could have been prevented by the moving of the cargo and the closing of the hatch. *Who testified to those assertions? Absolutely no one.*

Where is there any evidence that even if the cargo had been removed, the hatch could have been closed? So far as the evidence discloses, the hatches may have been stowed away under other cargo, for, manifestly, there was no prospective need of them on the voyage. *There being no evidence that the 'tween deck hatch could have been closed, how can this court say that the damage could have been prevented by raising and moving the cargo?* And, if the hatches were not available, because perchance they were stowed away beneath other cargo, no negligence in that regard could have been charged, for the hatches would not have been needed in any event if the cargo had not heated.

Appellees suggest the availability of the forecastle deck awnings. *Who testified that they were suitable for the use to which appellees would apply them? Absolutely no one.*

Does a fair preponderance of the evidence within the requirement of the rule laid down in *The Koranna* and *The Dolbadarn Castle* mean that there must be *some* evidence? It certainly does! If so, where is the evidence when no witnesses, other than the master and chief officer, were called and interrogated to the points which we have been mentioning? There is none. *In these circumstances, either this court must find that the burden of proving negligence has not been sustained by appellees, or the burden of proof rule, so clearly announced by high authority, will be reduced to a mere formula.*

We respectfully submit that this court should enforce the burden of proof rule as every other court has done in similar cases under the evidence adduced, and want of evidence, and should hold that appellees have not shown that the damage was caused by negligence.

IV.

IF IT WAS NEGLIGENCE NOT TO CLOSE THE HATCH, SUCH NEGLIGENCE WAS IN THE MANAGEMENT OF THE VESSEL WITHIN THE PROTECTION OF THE HARTER ACT.

The fact that in course of the argument we were frank enough with the court to say that we were not absolutely certain in our own minds that, if there was negligence in not closing No. 1 'tween deck hatch it was negligence in the management and navigation of the vessel within the protection of the Harter Act, should not be construed by the court as a receding from the contention which we have made in our opening brief. The Supreme Court, in *The Germanic*, pointed to the possibility of such a perplexity. Necessarily, there is much to be said upon both sides of the question, as appellees concede when they admit that the latest decision of the Circuit Court of Appeals for the Second Circuit in

United States v. N. Y. & O. S. S. Co., 216 Fed. 61,

upholds our contention.

That decision cannot be distinguished, however, and its effect cannot be detracted from, by the suggestion of counsel that the writer of the opinion, Circuit Judge

Rogers, seems new to the consideration of admiralty cases, and that "he certainly is ignorant of the historic ruling decisions on the Harter Act". Judge Rogers has too long held a position of high eminence, as a lawyer, a scholar in the field of jurisprudence, and a judge, to be successfully stamped as "ignorant" of, or "new" to, the course of admiralty decisions.

Two other circuit judges, Lacombe and Ward, sat in the case and approved of the opinion. Certainly, as to those judges, even counsel would not say that they are "ignorant" of, or "new" to, the historic decisions on the Harter Act, for, unquestionably, as members of the Circuit Court of Appeals for the Second Circuit, they have reviewed in the same length of time, more admiralty decisions than any other court in the United States. At least one of them, Circuit Judge Ward, was a distinguished admiralty lawyer at the bar before he ascended the bench. The other, Circuit Judge Lacombe, was the author of the opinion "on the Harter Act" in *The Persiana,* 185 Fed. 396, relied upon by appellees. The decision, then, must be distinguished, if at all, upon grounds other than personal to the judge writing the opinion.

But, whatever counsel may have said as to the knowledge of Circuit Judge Rogers, they are silent as to the qualifications of District Judge Brown, of the Southern District of New York, than whom no district judge has tried more admiralty cases. Counsel make no attempt to distinguish the decisions of Judge Brown, cited in our opening brief, and yet the decision in *U. S. v. N. Y.*

& O. S. S. Co., supra, is grounded upon his earlier decision in

The Guadeloupe, 92 Fed. 670.

In that case, hatches were not opened in a port of distress, which, if they had been opened and the cargo removed, would have disclosed the damage to the cargo. The court held the failure to open them and to remove the cargo negligence in management. As we read the decision, it is indistinguishable from the one at bar, once it is found that those on board the "Skipton Castle" were negligent in not removing the cargo and closing the hatch.

In a still more pointed case, that of

The British King, 89 Fed. 872; aff. 92 Fed. 1018,

Judge Brown held it to be negligence in management of the vessel within the exemption of the Harter Act, where soundings were not taken and the pumps not applied, with the result that water leaking from a ballast tank was thereby permitted to accumulate in the cargo compartment and damage the cargo. We cannot distinguish the facts of that case, in their essential elements, from those now before the court. On the theory by which negligence is here claimed, heat from the lower hold passed through the hatch and reached the 'tween deck cargo; there, water from a ballast tank passed through a leak and reached the cargo. Here, it is said that a closing of the hatch would have prevented the heat from reaching the cargo; there it was found that a sounding and the working of the pumps would have prevented the water from reaching the cargo. The failure

complained of in both cases was that of not utilizing the means at hand, in one case pumps—in the other, hatches, to prevent the harmful agencies from reaching and injuring the cargoes. In the case cited, Judge Brown, in the District Court, and Circuit Judges Wallace and Lacombe, in the Circuit Court of Appeals, held the failure negligence in management. Why, then, is not the negligence herein complained of equally negligence in management, if it be negligence at all? We cannot distinguish the case, and counsel made no attempt to do so.

For like reasons we are unable to distinguish the decision of Judge Brown in

The Ontario, 106 Fed. 324, (affirmed 115 Fed. 769).

We can see no difference between not putting on the 'tween deck hatches on the "Skipton Castle" to prevent the heat from the lower hold reaching the cargo in the 'tween decks, and the failure to report a leak in a ballast tank and keep the pump going so that no accumulation of water from the ballast tank would rise and damage the cargo. Yet Judge Brown held that the latter failure was negligence in management.

In

The Jean Bart, 197 Fed. 1002,

the negligence was in not using the ventilators and hatches for the very purpose for which they had been installed in the ship, to wit, the preservation of the cargo on the voyage. It is true that the hatches were intended to complete the ship's structure, but it appears that they were used as a part of the ventilating system, just as much as the ventilators proper. As we read the

decision, it was because of the failure of the master to use the equipment intended for the preservation of the cargo that Judge Dietrich held the ship liable. In that case, Judge Dietrich recognized that his views were at variance with certain expressions found in

Rowson v. Atlantic Transport Co., supra,

and

The Hudson, 172 Fed. 1005.

In

The Germanic, 196 U. S. 589,

the negligence was in the unloading of the cargo, and not in the improper use, or failure to use, part of the ship's equipment intended and placed on board primarily for the care of the cargo. This, the Supreme Court pointed out with emphasis when it said:

> "That 'in' which, as the statute put it, the fault was shown, was not in the management of the vessel, but unloading cargo; and, although it was fault only by reason of its secondary bearing, the primary object determines the class to which it belongs."

We cannot read the decision of this court in

Nam v. The Appalachee, 202 Fed. 822,

as decisive of the precise question which is now before the court in this case. Similarly, with

Corsar v. J. D. Spreckels Bros. & Co., 141 Fed. 260.

This court will note that the Supreme Court of the United States in

Martin v. The Southwark, supra,

quoted at length from *Rowson v. Atlantic Transport Co.,* but upon another point than that under present

consideration. We refer to its having been mentioned in that case to emphasize the weight which the Supreme Court evidently considered should be given to the decision of the English Court of Appeals. In the *Rowson* case, with respect to the negligent management of the refrigerating apparatus, Romar, L. J., said:

> "In the present case the facts which prevent me from differing from the learned judge in the court below in his conclusion of facts are these. It appears that, as part of the vessel, there were several refrigerating chambers, and there was in particular a pipe, the operation of which when properly worked was to keep the air of the refrigerating chambers sufficiently cool. Now those chambers were not all used for the cargo of butter, for during the particular voyage we are now considering two of them were being used for the ordinary purposes of the ship in this sense, that they were used for the storage of provisions which required refrigerating, those provisions being required for the ordinary purposes of the ship's crew, or of the passengers, if there were any, during the course of the ship's voyage as a sea-going carrier. The man who had to attend to this pipe was an engineer of the ship employed in the ordinary way in looking after this pipe regarded as part of the vessel. He had not been specially told, nor was it his special duty, to look after the cargo in particular or any part of the cargo. The pipe he had to attend to was wanted, as I have pointed out, for the general purposes of the ship as well as for the requirements of some of the cargo, but, so far as the engineer attending to it was concerned, all he had to do was to look upon it as it was, namely, as a pipe required for the general purposes of the vessel. He had not to consider it as affecting any *special or particular* part of the cargo; indeed, I may point out that this engineer would have had to attend to this pipe, as it appears from the facts of the case, even if there

has been no cargo requiring refrigerating, for he would have had to keep the pipe at work for the purpose of keeping cool the two chambers which contained the ship's provisions; and the injury to the cargo which was caused by the act of negligence was only indirectly caused by the act. The effect of his act was to prevent the pipe acting properly so as to cool the refrigerating chambers as a whole, and the effect of that upon some of the refrigerating chambers was that the temperature got above the proper temperature necessary for proper preservation, and part of the cargo became injured. But, as I have said, it really was, properly regarded, only an indirect injury to the cargo; so far as the pipe itself was concerned, the pipe was intact; the mismanagement of the pipe was a mismanagement of it in working the pipe *qua* pipe, as I have said, and as part of the vessel When I look at all these facts of the case, the conclusion I have come to is that *this engineer was guilty of an act of negligence in the management of the ship regarded as a vessel, and even regarded as a vessel carrying cargo.* In any point of view it was, in my judgment, an act of negligence by an officer of the ship in the performance of his duties to the ship as a ship, not with regard to any particular cargo, and was such an act as really concerned the management of the vessel as a whole, and, therefore, in my opinion, really came within the express limitation of sect. 3 of the Act." (Italics ours.)

In

The Rodney, 9 Asp. M. C. 39,

the negligent puncturing of a drainage pipe, which permitted water to reach and damage cargo, was held to be negligence in the management of the ship within the exemption of the Harter Act. In speaking of what is meant by the words "management of the ship", as used in the Act, Barnes, J., said:

> "It seems to me that they extend to the proper handling of the ship as affecting the safety of the cargo, and I agree with the president that the appeal should be allowed."

The damage under consideration in

Knott v. Botany Worsted Mills, 179 U. S. 69,

cited by appellees, was caused by negligence in the loading of the vessel. This court will note with interest, in view of the criticisms made of Circuit Judge Rogers, that the Supreme Court quoted with approval and at length from the opinion of District Judge Brown, whose opinions in the numerous cases we have cited lay down the principle upon which Circuit Judge Rogers based his opinion in the case which appellees concede upholds our contention. In the portion of his opinion quoted by the Supreme Court, Judge Brown said:

> "The negligence consisted in stowing the wool far forward, without taking care subsequently that changes of loading should not bring the ship down by the head. I must therefore regard the question as solely a question of negligence in the stowage and disposition of cargo, and of damage consequent thereon, though brought about by the effect of these negligent changes in loading on the trim of the ship. * * * The change of trim was merely incidental, the mere negligent result of the changes in the loading, no attention being given to the effect on the ship's trim, or on the sugar drainage."

In a part of the opinion not quoted by the Supreme Court, Judge Brown carefully pointed out that his decision was based upon negligence in loading and nothing else. So clearly does this appear that we quote it:

> "The primary cause of the damage was negligence and inattention in the loading or stowage of the cargo, either regarded as a whole, or as respects the juxtaposition of wet sugar and wool bales placed far forward. The wool should not have been stowed forward of the wet sugar unless care was taken in the other loading, and in all subsequent changes in the loading, to see that the ship should not get down by the head" (76 Fed. 582, 583).

In

The Persiana, 185 Fed. 396,

cited by appellees, the decision of the Circuit Court of Appeals for the Second Circuit decides nothing in point with the particular question now claiming this court's attention, so that it cannot be said that Judge Rogers, in deciding *U. S. v. N. Y. & O. S. S. Co.,* following Judge Brown's decision in *The Guadeloupe,* overrules *The Persiana.*

In the present case, the negligence charged is in not covering the hatch to prevent damage to a portion of the cargo from heat which developed in other cargo. The hatch was a part of the ship's equipment, *qua* ship, not primarily intended to protect the cargo. The failure to use the hatches, on the theory advanced, resulted in damage to the cargo. Such failure was not, however, in caring for the cargo, but in *not* utilizing the ship's equipment for the purpose to which it is said it ought to have been applied in this special instance.

In *The Jean Bart,* the negligence consisted in the failure to use equipment installed in the ship for the *specific* purpose of preserving the cargo. In *Knott v. Botany Worsted Mills* and in *The Germanic,* the negli-

gence did not consist of a failure to use the ship's equipment, but in loading and unloading, respectively, the cargo.

On the other hand, in *The Ontario* and *The British King* and *The Guadeloupe* and *U. S. v. N. Y. etc S. S. Co.*, as in the case at bar, if there was negligence, the negligence consisted in the failure to use a part of the ship's equipment *not primarily intended* for the safeguarding of the cargo; and in *Rowson v. Atl. Trans. Co.*, the negligence was in not properly using equipment *not solely intended* for the cargo. In all of those cases, to apply the principle announced by Barnes, J., in *The Rodney, the failure was in the handling of the ship's equipment, which affected the cargo. It was not a failure to use something primarily intended to preserve the cargo.*

It is in this that the present case is to be distinguished from those cases upon which appellees rely.

We respectfully submit that if there was any negligence in the officers and crew of the "Skipton Castle" not raising and moving the cargo and closing the hatch, it was negligence in the management of the vessel within the exemption of the Harter Act.

SUMMARY.

We respectfully submit that the decree of the District Court should be reversed and the cause remanded with instructions to dismiss the libel with costs, for the following reasons:

1. That, it appearing that the injury to the cargo was clearly within the specific exceptions of the bills of lading against heat, breakage, rust, decay, wastage, damage to wrappers, etc., the burden of proof was upon appellees to show that the damage was caused by the negligence of appellant, its officers or agents.

2. That appellees have not sustained the burden of proving that the damage in question was caused by negligence.

3. That the evidence shows that the "Skipton Castle" was in all respects seaworthy.

4. That the evidence shows that there was no negligence in the stowage, care, custody or delivery of the cargo.

5. That if there was any negligence in not moving and raising the cargo and closing the hatch, it was negligence in the management of the vessel within the exemption of the Harter Act.

Dated, San Francisco,
August 21, 1916.

Respectfully submitted,
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